

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

September 19, 2006 Session

**JOSEPH M. HASKINS, INDIVIDUALLY AND AS EXECUTOR OF THE
ESTATE OF DREW E. HASKINS, JR., DECEASED
v. DREW E. HASKINS III**

**Appeal from the Chancery Court for Hamilton County
No. 00-0292 Howell N. Peoples, Chancellor**

No. E2005-02868-COA-R3-CV - FILED OCTOBER 24, 2006

Drew E. Haskins, Jr., and his two sons, Drew E. Haskins III, and Joseph M. Haskins, formed two partnerships, Capital Developers Partnership and Dayton Pike Plaza Associates, with each sharing an equal one-third interest in both partnerships. After the father's death, the sons continued to operate the partnerships and elected not to purchase their father's partnership interest. Four years after the father's death, suit was filed to dissolve the partnerships. The trial court ordered that the partnerships be dissolved. On appeal, questions are raised regarding the trial court's rulings as to the distribution of monies related to the Capital Developers Partnership, as to the propriety of actions taken by Joseph M. Haskins after he elected himself managing partner of that partnership and as to Drew E. Haskins III's request for attorney's fees and expenses with regard to both partnerships. We affirm the trial court's ruling that Joseph M. Haskins did not have to pay interest on funds that he erroneously paid himself as managing partner of Capital Developers Partnership and was later required to reimburse; affirm the trial court's ruling that the Estate of Drew E. Haskins, Jr.'s interest in Capital Developers be determined as of the date of the partnership's dissolution rather than at the time of final distribution of proceeds from its sale; and affirm the trial court's approval of a lease executed by a tenant of the Capital Developers Partnership and Joseph M. Haskins after the latter proclaimed himself managing partner of that partnership. We affirm in part and reverse in part the trial court's denial of Drew E. Haskins III's request for attorney's fees, costs and expenses as to both partnerships and remand for further determination in that regard. Finally, we reverse the trial court's ruling that the Drew E. Haskins, Jr. Estate should receive interest on proceeds realized from the sale of Capital Developers after such funds were deposited in the clerk and master's office.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part
and Reversed in Part; Cause Remanded**

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

John P. Konvalinka and Mathew D. Brownfield, Chattanooga, Tennessee, for the Appellant, Drew E. Haskins III.

Robin L. Miller, Charles J. Gearhiser, and R. Wayne Peters, Chattanooga, Tennessee, for the Appellee, Joseph M. Haskins, Individually and as Executor of the Estate of Drew E. Haskins, Jr., Deceased.

OPINION

I. Background

In 1983, Drew E. Haskins, Jr., and his two sons, the appellant, Drew E. Haskins III, and the appellee, Joseph M. Haskins, formed a partnership designated Dayton Pike Plaza Associates (“the Plaza partnership”) to lease property in Tennessee. Later, in 1986, the three formed a second partnership designated the Capital Developers Partnership (“Capital Developers”) for the purpose of leasing a building in Catoosa County, Georgia, to Capital Bank. Each of the partners held an equal one-third interest in both partnerships. Drew E. Haskins III was elected and designated managing partner of Capital Developers.

In April of 1996, Drew E. Haskins, Jr. died, and on April 18, 1996, Joseph M. Haskins was appointed executor of the Estate of Drew E. Haskins, Jr. (“the Estate”). The Capital Developers partnership agreement provided as follows in the event of a partner’s death:

The Partnership shall not be dissolved by the death of a partner. The remaining Partners shall have the right to continue the Partnership business under its present name following the death of a Partner, provided they elect to purchase the interest of the deceased Partner and make payments specified in Paragraphs 20 and 21. The election to purchase the interest of a deceased Partner shall be exercised by written notice delivered within three (3) months after the effective date of the appointment of a personal representative on behalf of a deceased Partner. The notice may be delivered in person or may be mailed by registered or certified mail to the personal representative of the deceased Partner.

It is undisputed that, although the surviving partners did not elect to purchase the interest of Drew E. Haskins, Jr. after his death, they treated both partnerships as ongoing after that time.

In March of 2000, Joseph M. Haskins, individually and as executor of the Estate, filed a complaint in the Hamilton County Chancery Court against his brother, Drew E. Haskins III, alleging that the latter had breached his fiduciary duties by paying himself unreasonable management fees from Capital Developers and from the Plaza partnership. The complaint sought an accounting with regard to both partnerships, requested that Drew E. Haskins III be required to account for

management fees, demanded the expulsion of Drew E. Haskins III from Capital Developers, and requested that the Court dissolve the Plaza partnership.

In his answer and counterclaim to this complaint, Drew E. Haskins III denied that any of the management fees he received were unreasonable or improper, denied all allegations of wrongful conduct, and denied the necessity of a judicial dissolution. The counterclaim contained three counts. Count one noted that because no partner elected to purchase the shares of Drew E. Haskins, Jr., as required under the Capital Developers partnership agreement, that partnership should have ended three months after Joseph M. Haskins' appointment as personal representative of the Estate. Count one further asserted that because Joseph M. Haskins failed to elect to purchase the shares of his father, that Joseph M. Haskins as holder of one-third of the interest in Capital Developers Partnership, did not maintain the necessary two-thirds interest to expel Drew E. Haskins III; and that Joseph M. Haskins breached his fiduciary duty by attempting to expel Drew E. Haskins III from Capital Developers. Finally, count one requested the court to dissolve Capital Developers and to determine the rights and interests of the parties in the assets of that entity. Count two of the counterclaim asserted that the payment of management fees for Capital Developers and the Plaza partnership was expressly recognized by the partners, that such fees were at or below fair market value for such services, and that the appellee should not be allowed to unjustly benefit by avoiding the payment of reasonable management fees. Count three of the counterclaim asserted that, pursuant to the partnership agreements, the appellant was entitled to indemnification and reimbursement for all costs, expenses, and fees, including attorney's fees, related to this litigation.

In August of 2000, Joseph M. Haskins elected himself manager of Capital Developers, believing that he carried a two-thirds vote based upon his own one-third share, plus a one-third share he claimed as executor of his father's estate. Contrary to the partnership agreement, there was no notification of a meeting of partners as to this action of the appellant, and no such meeting was held.

The case was tried without a jury in November of 2002. Upon finding that the surviving partners did not elect to purchase the interest of the Estate, the trial court ruled: 1) Capital Developers was dissolved as a matter of law as of July 18, 1996, three months after the date Joseph M. Haskins was appointed personal representative of the Estate; 2) there was to be an accounting and payout of appropriate partnership properties in proportions allowed under the partnership agreement as of July 18, 1996; 3) the management fees received by Drew E. Haskins III were reasonable and equitable; 4) that the Plaza partnership be dissolved effective November 6, 2002; 5) that the parties prepare and exchange accountings for the partnerships on or before January 6, 2003; 6) and the request of Drew E. Haskins III for attorney's fees be denied. After entry of this order, the trial court entered an additional order referring the case to the clerk and master for a determination as to the manner in which the two partnerships should be sold and as to the appropriate distribution of the net proceeds from the sale of Capital Developers. The trial court further directed that Drew E. Haskins III, Joseph M. Haskins, and the Estate should each receive one-third of the net sale proceeds of the Plaza partnership.

Pursuant to a ruling of the clerk and master, the partnership properties were sold at private auction on July 8, 2003, and Drew E. Haskins III was the successful bidder as to both partnerships. Although closing was scheduled for September 24, 2003, prior to that date, Joseph M. Haskins filed a motion to set aside the sale based in part upon allegations that Drew E. Haskins III had failed to close the sale within a reasonable period of time. This motion was granted by order of the clerk and master; however, the clerk and master's order was reversed by order of the trial court which decreed that closing take place within thirty days of the date the latter order became final. Drew E. Haskins III's request for attorney's fees incurred opposing the motion to void the sale was denied.

The re-scheduled closing was held on June 1, 2004, and the proceeds from the sale of the partnerships were paid into the office of the clerk and master as ordered.

Pursuant to request of the parties and by memorandum opinion and order entered June 21, 2005, the trial court held that the Estate's interest in Capital Developers should be determined as of July 18, 1996, and that the Estate was entitled to receive the value of a one-third interest in Capital Developers as of July 18, 1996, plus interest in the amount of ten percent per annum. The trial court further ruled that Drew E. Haskins III and Joseph M. Haskins were entitled to split equally the remaining balance of the proceeds attributable to Capital Developers. After entry of this order, motions were filed requesting that the trial court address, *inter alia*, remaining issues of whether, in 2003 and 2004, Joseph M. Haskins improperly paid himself \$25,500¹ as fees for the management of Capital Developers from August of 2000 through November of 2002 and of the propriety of Joseph M. Haskins' negotiation and execution of an amended lease between Capital Developers and Capital Bank after Joseph M. Haskins elected himself managing partner of Capital Developers in August of 2000. Drew E. Haskins III also requested that the trial court address his objection to the award of interest to the Estate beyond June 1, 2004, the date of the closing of the partnership properties. All of these issues were tried in October of 2005, and on November 14, 2005, the trial court entered its final order which provided in pertinent part as follows:

The management fee for the management of Capital Developers in the amount of \$25,500.00 paid to [Joseph M. Haskins] is disallowed and shall be reimbursed by [Joseph M. Haskins] to Capital Developers; however, [Joseph M. Haskins] is not required to pay interest on management fees taken;

The rental amount as provided in the lease between Capital Developers and Capital Bank is approved as a new lease was negotiated and entered into between the parties and there was no evidence presented that the new rental amount was not reasonable.

¹The record indicates that Joseph M. Haskins paid himself management fees in the amount of \$21,750 in December of 2003 and additional management fees in the amount of \$3,750 in 2004.

The final order further provided that the Estate be paid for its share in Capital Developers as of July 18, 1996, plus ten percent interest from that date until disbursement of the funds by the clerk and master.

II. Issues

The following issues are presented for our review:

1) Whether the trial court erred in failing to order that Joseph M. Haskins pay interest on the \$25,500 Capital Developers management fees that he was required to reimburse.

2) Whether the trial court erred in holding that the Estate should have its interest in Capital Developers determined as of July 1996 rather than at final distribution.

3) Whether the trial court erred in approving the new lease between Capital Developers and Capital Bank which was executed by Joseph M. Haskins when he assumed control of Capital Developers in August of 2000.

4) Whether the trial court erred in awarding the Estate interest after the date the funds from the sale of Capital Developers were paid into the office of the clerk and master.

5) Whether the trial court erred in failing to award Drew E. Haskins III attorney's fees, costs, and expenses incurred by him with respect to Capital Developers and the Plaza partnership.

III. Standard of Review

In a non-jury case such as this one, we review the record *de novo* with a presumption of correctness as to the trial court's determination of facts, and we must honor those findings unless there is evidence which preponderates to the contrary. Tenn. R. App. P. 13(d); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings. *Seals v. England/Corsair Upholstery Mfg. Co.*, 984 S.W.2d 912, 915 (Tenn. 1999). The trial court's conclusions of law are accorded no presumption of correctness. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993).

IV. Prejudgment Interest on Reimbursed Management Fees

The first issue we address is whether the trial court should have ordered Joseph M. Haskins to pay prejudgment interest on the \$25,500 he erroneously paid himself for managing Capital Developers.

Although, as we have stated, the trial court disallowed this fee and ruled that it be reimbursed, the court did not require that Joseph M. Haskins also pay interest on the reimbursed funds. Because the trial court failed to set forth findings of fact or conclusions of law underlying its denial of prejudgment interest, it is not possible for us to know the basis of the trial court's decision.

Pursuant to Tenn. Code Ann. § 47-14-123, prejudgment interest may be awarded "in accordance with the principles of equity." In *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998), the Tennessee Supreme Court further stated as follows with respect to a trial court's decision in that regard:

An award of prejudgment interest is within the sound discretion of the trial court and the decision will not be disturbed by an appellate court unless the record reveals a manifest and palpable abuse of discretion. This standard of review clearly vests the trial court with considerable deference in the prejudgment interest decision. Generally stated, the abuse of discretion standard does not authorize an appellate court to merely substitute its judgment for that of the trial court. Thus, in cases where the evidence supports the trial court's decision, no abuse of discretion is found.

(Internal citations omitted).

As we have noted, Joseph M. Haskins did not pay himself the management fees in question until 2003 and 2004. On April 14, 2005, Drew E. Haskins III filed a motion for a decision by the trial court with respect to the propriety of these payments. This motion contained no prayer for relief with respect to the payments. On July 13, 2005, Drew E. Haskins III filed a motion for clarification and alternatively, to alter or amend judgment wherein he stated his belief that his motion of April 14, 2005, remained before the court and requested clarification as to whether that matter was resolved and that an evidentiary hearing be set if the matter was still pending. This second motion also contained no prayer for relief with respect to the payments.

Rule 8.01, Tenn. R. Civ. P., provides in pertinent part as follows:

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, *shall contain* (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) *a demand for judgment for the relief the pleader seeks*. Relief in the alternative or of several different types may be demanded.
(Emphasis added).

In *Mitchell v. Mitchell*, 876 S.W.2d 830 (Tenn. 1994), the Tennessee Supreme Court held that prejudgment interest may be awarded even though not pled as special damages where such

award is authorized under the prayer for general relief. However, if the relevant pleadings fail to include a prayer for either special relief or general relief, then an award of damages is improper. *See Mohn v. Graff*, E1999-01015-COA-R3-CV, 2000 WL 705314 (Tenn. Ct. App. E.S., filed April 25, 1994); *see also* GIBSON'S SUITS IN CHANCERY, (8th ed. 2004)(stating at §15.03 that “[a]s a rule, no relief can be granted if none is demanded; and no relief will be granted inconsistent with that demanded.”).

We have reviewed the record before us, and we can discern nothing in the pleadings which might be construed to be a request for damages with respect to the monies Joseph M. Haskins paid himself in 2003 and 2004 for management of Capital Developers. Accordingly, we do not agree that it would have been proper to award interest upon those funds, and we do not find that the trial court abused its discretion in denying such an award.

V. Date of Valuation of Estate's Interest in Capital Developers

The next issue we address is whether the trial court erred in ruling that the Estate's interest in Capital Developers should be determined as of July 18, 1996, rather than at the time of final distribution in June 2005.

In its memorandum opinion and order entered June 21, 2005, the trial court ruled that the Estate was entitled to receive the value of a one-third interest in Capital Developers as of July 18, 1996, three months after the date that Joseph M. Haskins was appointed executor of the Estate. Joseph M. Haskins asserts that this ruling was in error and that the Estate should have been allowed its one-third share of the proceeds of Capital Developers to be determined based on its value at the time of the final distribution in June 2005.

Joseph M. Haskins contends that he and the Estate continued to operate Capital Developers as equal partners after July 18, 1996. He contends that he and Drew E. Haskins III treated the Estate as an equal partner after the death of Drew E. Haskins, Jr., and that this was reflected on the partnership's income and expense statements and on the partnership's tax returns which, between 1996 and 2000, were prepared and filed by Drew E. Haskins III. Joseph M. Haskins also notes that in his counterclaim Drew E. Haskins III alleged that he was the holder of only a one-third interest in the partnership. Joseph M. Haskins argues that he and Drew E. Haskins III voluntarily dissolved Capital Developers by not purchasing their father's interest in the partnership, as required by the partnership agreement. The partnership agreement further provides that in the event the partnership is voluntarily dissolved, “[t]he Partners shall continue to share the Operating Profits or Losses and Capital Profits or Losses during the liquidation in the same proportions as before dissolution.” Joseph M. Haskins notes that at no point during trial did Drew E. Haskins III argue that the Estate's interest in the partnership should be distributed as of July 18, 1996, and on December 30, 2002, the trial court entered an order proposed by Drew E. Haskins III which states in pertinent part as follows:

Capital Developers Partnership is dissolved as a matter of law as of July 18, 1996 due to the fact that no election was made by the remaining partners to purchase the interest of the Estate of Drew E. Haskins, Jr. in Capital Developers Partnership, pursuant to the Capital Developers Partnership Agreement. From that date forward there is to be an accounting and pay out of the appropriate partnership properties in the proportions for which the Capital Developers Partnership Agreement provides,

_____ Joseph M. Haskins asserts that paragraph 9 of the partnership agreement provides that “[a]ll allocations of ‘Capital Profits or Losses’ ... shall be divided and borne equally among the Partners” and defines “Capital Profits or Losses” to “include the net proceeds from a sale of the Partnership’s assets.” Joseph M. Haskins indicates that this language entitles the Estate to one-third of all of the partnership’s income and assets.

Joseph M. Haskins’ assertion that Drew E. Haskins III treated the Estate as an equal partner after the death of Drew E. Haskins, Jr., was addressed by the trial court in its memorandum opinion of June 21, 2005, as follows:

Drew Haskins, III, testified that, as managing partner, after the death of his father, he continued to recognize the Estate as an equal one-third partner. As managing partner, he treated the [E]state as an equal one-third partner in filing tax returns and accountings. Joseph Haskins contends that Drew Haskins, III, is estopped from now contending that the Estate’s interest is limited to the value as of July 18, 1996.

Although Joseph M. Haskins does not specifically argue on appeal that, because of Drew Haskins III’s actions after the death of his father, Drew E. Haskins III is estopped from denying that the partnership continued with the Estate as an equal partner, we construe that to be his argument. The trial court rejected this estoppel argument under the evidence presented and applicable Georgia law as follows:

Joseph Haskins also contends that the partnership continued with the decedent as a partner since by statute, the law of estoppel applies to partnerships in Georgia. O.C.G.A. § 14-8-4(b). A party asserting estoppel must establish facts to substantiate estoppel, such as conduct amounting to false representation or concealment of material facts, the intention or expectation that such conduct will be acted upon by the other party, knowledge by the party to be estopped of the real facts, and the party claiming estoppel must establish lack of knowledge of the true facts, reliance upon the conduct of the party to be estopped, and action based thereon of such character as to change

its position prejudicially. *Horne v. Exum*, 419 S.E.2d 147 (Ga. App. 1972). The elements of estoppel are not established by the evidence in this case.

Our review of the record compels us to agree with the trial court's conclusion that the elements of estoppel were not established in this case. Joseph M. Haskins references no evidence or authority which negates the trial court's ruling in this regard. Therefore, we find no merit in the his argument that because of the treatment accorded the Estate by Drew E. Haskins III the partnership continued with the Estate as an equal partner. Further, Joseph M. Haskins presents no authority in support of his argument that the surviving partners' failure to purchase the interest of Drew E. Haskins, Jr., constituted a voluntary dissolution of the partnership. "The voluntary dissolution of a partnership must be proved by evidence showing not only that the parties mutually agreed to dissolve it but that they performed acts in accordance with their mutual agreement for dissolution." 59A AM. JUR. 2d Partnership §551. We do not agree that the surviving partners' neglect to purchase the interest of their father showed a mutual agreement to dissolve Capital Developers, and Joseph M. Haskins presents no authority to the contrary. Further, Joseph M. Haskins presents no evidence that he and Drew E. Haskins III performed any acts in accordance with a mutual agreement for dissolution and, therefore, it is our determination that he has failed to meet his burden of proof as to this issue. Finally, Drew E. Haskins III's argument that the trial court's order of December 30, 2002, required that the Estate receive a one-third share of the partnership assets available at final distribution ignores the fact that the Estate was no longer a partner after July 18, 1996, the partnership having been dissolved as a matter of law upon that date. For all of these reasons, we find no merit in Joseph M. Haskins' argument that the trial court erred in its ruling on this issue.

VI. The New Lease

The next issue we address is whether the trial court erred in upholding and enforcing the lease between Capital Developers and Capital Bank which was negotiated and executed by Joseph M. Haskins after he elected himself managing partner of Capital Developers in August of 2000.

Three lease agreements between Capital Developers and Capital Bank were in evidence at the trial of this case on October 12, 2005 - the original lease agreement between those two entities, the first amendment to the original lease (designated "Lease Modification Agreement #1), and the second amendment to the original lease (designated "Second Amendment to Lease Agreement"). The original lease provided for a lease term of 10 years from May 1, 1986, through April 30, 1996. Lease Modification Agreement #1 extended the original lease for an additional five years, from May 1, 1996, through April 30, 2001, and provided that at the expiration of this five-year term, Capital Bank was entitled to again extend the lease for five years. However, upon expiration of Lease Modification Agreement #1, Capital Bank chose not to exercise that option. Instead, Capital Bank agreed to a year-to-year lease as provided in the Second Amendment to Lease Agreement. Joseph M. Haskins testified in this regard as follows:

Q Were there any negotiations with regard to the bank continuing to occupy the real [e]state?

A There were.

Q Tell us about those negotiations.

A They did not want to renew for the five-year period. They wanted to go to year to year.

...

Q Just part of your negotiations when this developed?

A Yes. In return for going to a year-to-year lease, they were willing to increase the rent yearly instead of lock it in for five years. That was the lease that we went with, which has actually earned the partnership more money than if we would have gone on the five-year lease.

...

Q All right, sir. You said the rent was increased. Do you know how much the rent increase was?

A Yes. It was over \$1000 per month, over 10 percent. I think it was 8880, up to 9930.

Drew E. Haskins III testified that when the original lease was set up, the amount of rent to be paid each month was “pegged to a standard that would change with inflation over time, so that the future rents would all reflect, in effect, the terms of the original lease. The amount would not change up or down. It would adjust for inflation.” The standard that was chosen to accomplish this was the consumer price index. However, Drew E. Haskins III contends that the “CPIU” or “Consumer Price Index for All Urban Consumers,” was chosen when the original lease was entered into and should have been used in calculating the amount of rent due under the Second Amendment to Lease while Joseph M. Haskins contends that the “CPIW” or “Consumer Price Index for Urban Wage Earners and Clerical Workers” was the standard under the original lease and was the proper standard under the Second Amendment to Lease Agreement. The parties’ disagreement as to which standard should apply was reflected in correspondence between them as discussed below, and Drew E. Haskins III argues that a larger amount of money would have been realized had Joseph M. Haskins used the CPIU rather than the CPIW.

In its memorandum opinion incorporated into its final order of November 14, 2005, the trial court ruled as follows:

On the issue of the amendment to the lease that was negotiated by Dr. Joseph Haskins and which is designated as [Second Amendment to Lease Agreement] ..., the Court finds that the original lease and [Lease Modification Agreement #1], that the original lease by its terms had expired without being renewed or the option to extend renewed; and therefore, there was, in fact, no lease between Capital Developers and Capital Bank; and that Dr. Joseph Haskins, in fact, negotiated a new lease. He did that on behalf of the partners.

That new lease, in fact, through [the Second Amendment to Lease Agreement] incorporated terms from the original lease and [Lease Modification #1], but in fact and in law it was a new lease. There is no evidence the Court finds that it was not reasonable or that the rents that were set out in this new lease were not reasonable. The Court is not going to allow or require any reimbursement by Dr. Joseph Haskins for the difference in what would have been allowed under the original lease in terms of rent and what is paid under the [Second Amendment to Lease Agreement].

Drew E. Haskins III argues that the trial court erred in approving Joseph M. Haskins' negotiation of the Second Amendment to Lease Agreement and contends that this lease was unenforceable. In support of his argument, Drew E. Haskins III notes that the trial court previously ruled that Capital Developers should have been valued as of July 18, 1996, and that he and his brother held equal shares after that date. Drew E. Haskins III maintains that after July 18, 1996, Joseph M. Haskins could not claim control of the Estate's interest in the partnership and therefore, lacked authority to enter into the lease based upon a controlling interest in the partnership. Further, Drew E. Haskins III notes that he did not sign the new lease as required by the following provision of the partnership agreement:

Contracts. All contracts or commitments in connection with the Partnership and any contract of sale, deed, mortgage or lease concerning the Partnership or any part thereof must be signed by all of the Partners in order to be valid and binding upon the Partnership.

Even assuming, for the reasons stated by Drew E. Haskins III, that the Second Amendment to Lease Agreement constituted a voidable contract, it does not follow that this agreement did not subsequently bind the partnership. It is well established in this state and elsewhere that a voidable contract may be ratified by either the action or non-action of a party, as we acknowledged in *Valley Fidelity Bank and Trust Co. v. Cain Partnership, Ltd.*, 738 S.W.2d 638, 639-40 (Tenn. Ct. App. 1987):

A voidable contract is subject to ratification. *Hinton v. Robinson*, 51 Tenn. App. 1, 364 S.W.2d 97 (1962), and ratification can be described as “confirmation after conduct” manifested by acts or statements. *Osborne Co. v. Baker, et al.*, 35 Tenn. App. 300, 245 S.W.2d 419 (1951); *Bagley & Co. v. Union-Buffalo Mills Co.*, 9 Tenn. App. 63 (1928). Silence can amount to a ratification where a party with knowledge of the transaction fails for a reasonable time to protest or dissent. *McClure v. Evarston and Mottley*, 82 Tenn. 495 (1884). However, there can be no ratification unless a party is informed of the facts necessary to form an opinion. *Trotter v. Peterson*, 166 Tenn. 142, 60 S.W.2d 149 (1933); *Wagner v. Frazier*, 712 S.W.2d 109 (Tenn. App. 1986).

The record shows that on May 30, 2001, Joseph M. Haskins sent the following letter to Drew E. Haskins III regarding the Second Amendment to Lease Agreement:

Dear Drew,

Capital Bank did not exercise its 5 yr. lease option. Instead the real estate committee has asked the lease be amended for 1 yr. with 4 1 yr. options. Each year the rent will adjust with the CPI-U² as defined in the lease. Enclosed is a copy of the correspondence from Capital Bank, dated April 30, 2001, regarding Amendment of the Lease between Capital Developers and Capital Bank. Also enclosed is a copy of Capital Bank’s calculations of the lease payments.

I intend to accept the amended term of the lease on behalf of Capital Developers. If you have any comments, please let me know.

Sincerely,

Joe Haskins
Managing Partner of Capital
Developers

On June 1, 2001, the Second Amendment to Lease Agreement was signed by Joseph M. Haskins as managing partner of Capital Developers and by James D. Flowers as president of Capital Bank. On that same date Joseph M. Haskins mailed the following letter to Drew E. Haskins III:

Dear Drew,

² This letter erroneously stated that rent will be adjusted pursuant to “the CPI-U”. In fact, Joseph M. Haskins adjusted rent pursuant to the CPI-W, as shown by his testimony and other evidence.

Enclosed is a Second Amendment to the Lease between Capital Developers and Capital Bank extending the terms of the lease for one year with an option to extend the term for up to four additional terms of one year each and increasing the rent from \$8820 to \$9930. As Managing Partner of Capital Developers, I have entered into the Second Amendment. Please let me know if you have any questions regarding the enclosed document.

Sincerely,

Joe Haskins

Although this evidence indicates that Drew E. Haskins III was provided with a copy of the Second Amendment to Lease and was requested to submit comments, Joseph M. Haskins testified that at no time did Drew E. Haskins III object to the Second Amendment to Lease Agreement.

The following letter dated June 13, 2001, was also mailed to Drew Haskins III after he questioned Joseph M. Haskins about the method used to calculate rent due from Capital Bank:

Drew,

You are correct that we used March 2001 and not April 2001 for our calculations. March was used since April was not available at the time of renewal. Other than this point, your letter was totally incorrect and makes me question the competence of the prior management. A review of the file shows that you made the same mistake when the lease was renewed previously and Mr. Coe had to correct you.

Enclosed is a copy of section 2.2 of the lease. Obviously, CPI-W not CPI-U is to be used for the calculation. Also, enclosed is the CPI-W extracted on May 1st, the date of lease renewal.

Sincerely,

Joe Haskins
Managing Partner

Drew E. Haskins III responded to this letter by letter dated June 19, 2001, which stated as follows:

Re: letter dated 6/13/01 regarding Capital Bank's rental rate

Dear Joe,

It is evident from your letter that confusion still exists regarding the calculation of the new rental rate for Capital Bank's lease of the Ringgold property. Let me clarify this matter, as it is really not that complex.

First note that neither the full CPI, nor CPI-W have anything to do with the calculation. Although section 2.2 of the lease references the CPI-W (Urban Wage Earners and Clerical Workers), please note that this is a routine "boiler plate" clause included in many leases which goes on to state "*or any ... substitute index appropriately adjusted.*"

At the initial agreement in 1986 to execute this lease, all parties agreed to use the CPI-U as the actual base line index. (I think either the bank attorney or accountants, but not me, recommended it.) Therefore, the CPI-U value for April 1986 of 108.6 was tied to the initial rental rate of \$6,250. Your review will note that since 1986 all rental payments and rate adjustments have been calculated using this base line CPI-U value of 108.6. This value is not found in March 1986 of either the full CPI or the CPI-W. I am still unclear as to why you think the base index of 108.6 and its repeated use relate to either the full CPI or CPI-W. They never have. Your consultant should have realized his error immediately when he tried to verify the 108.6 index value on the CPI or CPI-W charts.

You are partially correct in noting that on a prior occasion I too was not supplied CPI-U values, so my initial calculations were incorrect. However, when I discovered the error I immediately sent Mr. Coe a letter noting the corrected rental rate as recalculated per the CPI-U index. The point being, we were all working together to obtain the correct numbers (based on the CPI-U index of 108.6). I hope that is the case now.

Again: $108.6/176.9$ equals $\$6250/\text{new rent}$
New rate = \$10,180.70902 or \$10,180.71

The issue of rounding the rent down to the nearest \$5 was a courtesy that I offered the Bank, so that the monthly check would not have to be written for an odd amount. That was not part of the lease but viewed as reasonable by both Dad and me. You can elect to do that if you wish or you can have the Bank pay the full amount.

This should clarify the details for you. If this does not ease your mind, please contact me.

Sincerely,

Drew Haskins III, MD

Although by this letter, Joseph M. Haskins disputed the appropriate method of calculating rent under the Second Amendment to Lease Agreement, Drew Haskins III did not contend that the new lease was unenforceable or protest the circumstances under which it was entered into. On the contrary, the letter confirmed Drew E. Haskins III's acceptance of the Second Amendment to Lease Agreement in that Drew E. Haskins III attempted to dispel confusion regarding "the new rental rate" and advised that Joseph M. Haskins might elect to either allow Capital Bank to round the rent down to the nearest five dollars or have them pay the full amount. Rather than asserting the invalidity of the new lease, Drew E. Haskins III suggested optional means of enforcing it.

It is our determination that Drew E. Haskins, III's failure to protest the Second Amendment to Lease within a reasonable time of its execution resulted in its ratification, notwithstanding his argument that the Joseph M. Haskins negotiated the lease without proper authority.

VII. Award of Interest to the Estate

The next issue we address is whether the trial court erred in awarding interest to the Estate on its share of Capital Developers up to the date of disbursal of the monies, rather than the date the funds were paid into the office of the clerk and master.

The funds from the sale of Capital Developers were paid into the office of the clerk and master on June 1, 2004. In its final order of November 14, 2005, the trial court decreed that, for its interest in Capital Developers as of July 18, 1996, the Estate be paid \$236,000, plus interest at ten per cent per annum from July 18, 1996, to the date the funds were disbursed by the court. Drew E. Haskins III contends that the trial court should not have awarded interest to the Estate beyond June 1, 2004, which was the date the sale proceeds were deposited in the clerk and master's office. We agree.

Rule 67.02, Tenn. R. Civ. P., authorizes a court to order that funds which are the subject of litigation be deposited in the court subject to the court's further orders. Rule 67.03, Tenn. R. Civ. P., further provides that "[u]pon making a deposit in court a party shall not be liable for further interest on the sum deposited."

Joseph M. Haskins notes that the trial court's unchallenged ruling in its memorandum opinion and order of June 21, 2005, recognized that the Estate's interest in Capital Developers was controlled by Georgia law. He insists that Georgia law, codified as follows at O.C.G.A. § 14-8-42, supports the trial court's award of interest to the Estate up to the date of distribution of the partnership sale proceeds:

When any partner withdraws or dies, and the business is continued under any of the conditions set forth in subsection (a) of Code Section 14-8-41 or paragraph (2) of subsection (b) of Code Section 14-8-38, without any settlement of accounts as between the withdrawn partner or the legal representative of the estate of a deceased partner and the persons or partnership continuing the business, unless otherwise agreed:

(1) Such persons or partnership shall obtain the discharge of the withdrawn partner or the legal representative of the estate of the deceased partner, or appropriately hold him harmless from all present or future partnership liabilities, and shall ascertain the value of his interest at the date of dissolution; and

(2) The withdrawn partner or legal representative of the estate of the deceased partner shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership *with interest*, or, at his option, in lieu of interest, the profits attributable to the use of his right in the property on the dissolved partnership, provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the withdrawn or deceased partner, shall have priority on any claim arising under this Code section, as provided by subsection (d) of Code Section 14-8-41.

(Emphasis added).

While this statute does indicate that the estate of a deceased partner is entitled to interest on funds constituting his share of a dissolved partnership, it does not indicate that liability for interest shall continue to increase even after such funds have been deposited to the court registry. As Joseph M. Haskins correctly stated in his brief, "the issue is not whether interest should have been awarded, but how long such interest should accrue." The cited statute does not address that issue in any way whatsoever.

In *Vooy's v. Turner*, 49 S.W.3d 318, 325-26 (Tenn. Ct. App. 2001), we summarized the effect of Tenn. R. App. P. 67 as follows:

Rule 67, then, governs deposits made pending determination by the trial court of the right to the property or money. *See* Tenn. R. Civ. P. 1 (rules apply in circuit and chancery courts). In that situation, Rule 67.03's initial condition that it applies only to money deposited "to abide the result of any legal proceeding" means "to wait for." *See* BLACK'S LAW DICTIONARY at 7 (6th ed. 1990). Thus, that sentence of Rule 67.03 which relieves a depositing party of interest can only apply to any pre-judgment interest which may be awarded by the trial court when it decides who is entitled to the money or property deposited. This provision is intended to encourage voluntary deposits under Rule 67.01 and to lessen costs to the depositor under Rule 67.02.

In the instant matter, the trial court did not decree what portion of the sales proceeds the Estate was entitled to until entry of the final order of November 14, 2005, and, abiding that decision, Drew E. Haskins III was relieved of paying interest on the monies he deposited in the office of the clerk and master. Therefore, the trial court erred in awarding interest beyond the date the funds were paid into the office of the clerk and master.

VIII. Attorney's Fees and Expenses

The final issue we address is whether the trial court erred in failing to award Drew E. Haskins III reimbursement of attorney's fees, costs, and expenses. He asserts that such an award was supported by the partnership agreements for both Capital Developers and the Plaza partnership which contained provisions allowing a partner indemnification and/or reimbursement of expenses. He maintains that he was the prevailing party in this case in that, 1) he successfully purchased and now owns both partnerships; 2) the trial court denied Joseph M. Haskins' attempt to void the sale of the partnerships; 3) the trial court found no merit in Joseph M. Haskins' allegations that Drew E. Haskins III wrongfully paid himself management fees for management of Capital Developers and denied Joseph M. Haskins' request that Drew E. Haskins III be expelled from the partnership and that the partnership be dissolved upon that ground; and 4) the trial court agreed with Drew E. Haskins III's claim that Joseph M. Haskins wrongfully paid himself management fees. While we do not agree that the trial court erred in denying Drew E. Haskins III attorney's fees, expenses, and costs requested in connection with his purchase of the partnership and successful opposition to the attempt to void the sale, we do believe he was entitled to such fees, expenses, and costs incurred with respect to the other matters listed because they were incurred in connection with partnership business while he was acting as managing partner.

The Tennessee Supreme Court recently restated the law in this state regarding the recovery of attorney's fees in *Taylor v. Fezell*, 158 S.W.3d 352, 359 (Tenn. 2005), as follows:

In Tennessee, courts follow the American Rule, which provides that litigants must pay their own attorney's fees unless there is a statute or

contractual provision providing otherwise. *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 194 (Tenn. 2000). “The allowance of attorney’s fees is largely in the discretion of the trial court, and the appellate court will not interfere except upon a showing of abuse of that discretion.” *Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn. 1995).

The indemnification clause of the Capital Developers partnership agreement relied upon by Drew E. Haskins III in support of his request for attorney’s fees states in pertinent part as follows:

The partnership shall indemnify and hold the Managing Partner harmless from and against any claim, demand or liability incurred by him in connection with the business of the Partnership, provided that the acts or omissions from which the claim, demand, or liability arose were performed or committed in the good faith belief that the Managing Partner was acting within the scope of his authority and in the best interest of the Partnership and that he was not grossly negligent or guilty of intentional misconduct.

Drew E. Haskins III also relies upon a provision of the Plaza partnership agreement which states in pertinent part that “[t]he Partners shall be reimbursed by the Partnership for all reasonable out-of-pocket expenses incurred by the Partners in connection with the conduct of the affairs of the Partnership.”

The language of the above referenced provision of the Capital Developers partnership agreement only calls for indemnification with regard to acts or omissions performed or committed by the managing partner “in the good faith belief that he was acting within the scope of his authority.” Further, the referenced language of the Plaza partnership agreement only requires reimbursement of expenses “incurred by Partners in connection with the conduct of the affairs of the Partnership.” We do not agree that either of these provisions dictated that Drew E. Haskins III be awarded attorney’s fees and expenses because he was successful in purchasing the partnerships or because Joseph M. Haskins’ attempt to void the sale failed. Drew E. Haskins III’s successful bid for the partnerships was primarily attributable to the fact that he offered more money than did his competition, and in purchasing the partnerships and opposing Joseph M. Haskins’ action to void the sale, he acted in his own behalf and was not acting within the scope of his authority as managing partner or in connection with the conduct of the affairs of the partnership. Accordingly, we do not agree that the partnership agreements supported an award of fees and expenses for those matters, nor do we find that the record otherwise supports a finding that the trial court abused its discretion in that regard.

However, the expenses and fees incurred by Drew E. Haskins III in defense of his payment of management fees to himself, against the attempt to expel him and in his efforts to recover on behalf of the partnership management fees that Joseph M. Haskins wrongfully received did constitute

liabilities incurred by Drew E. Haskins III in connection with the business of the partnership while acting within the scope of his authority as managing partner. Therefore, we agree that the partnership agreement requires that Drew E. Haskins III be awarded attorney's fees, costs, and expenses incurred by him in regard to these latter matters, and it is our determination that the trial court's denial of such was error.

IX. Conclusion

Based upon our findings stated herein, we affirm: the trial court's denial of prejudgment interest on the management fees reimbursed by Joseph M. Haskins; the trial court's ruling that the Estate should have its interest determined as of July 18, 1996; and the trial court's ruling upholding and enforcing the Second Amendment to Lease Agreement executed June 1, 2001. We reverse the trial court's award of interest on the Estate's share of proceeds from the sale of Capital Developers beyond the date such proceeds were deposited in the clerk and master's office. We affirm in part and reverse in part the trial court's denial of Drew E. Haskins III's request for reimbursement of attorney's fees, costs, and expenses, and we remand to the trial court for further proof regarding attorney's fees, costs, and expenses due Drew E. Haskins III, as set forth herein. Costs of appeal are assessed to the parties equally.

SHARON G. LEE, JUDGE